

UNITED STATES DISTRICT COURT

**ORIGINAL**

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable YVONNE GONZALEZ ROGERS, Judge

|                |   |                            |
|----------------|---|----------------------------|
| Impinj, Inc.,  | ) | <b>Claims Construction</b> |
|                | ) | <b>Hearing</b>             |
| Plaintiff,     | ) |                            |
|                | ) |                            |
| vs.            | ) | NO. C 19-03161 YGR         |
|                | ) |                            |
| NXP USA, INC., | ) | Pages 1 - 69               |
|                | ) |                            |
| Defendant.     | ) | Oakland, California        |
| _____          | ) | Friday, March 4, 2022      |

**REPORTER'S TRANSCRIPT OF PROCEEDINGS**

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1 Friday, March 4, 2022

9:04 A.M.

2 P R O C E E D I N G S

3 **THE CLERK:** Now calling civil case 19-3161-YGR  
4 Impinj, Inc. versus NXP U.S.A., Inc.

5 Counsel, if you please step forward to the podium, state  
6 your appearance for the record starting with the plaintiff.

7 **MR. AL-SALAM:** Ramsey Al-Salam of Perkins Coie, Your  
8 Honor. I'm accompanied by Daniel Keese of Perkins Coie.

9 And just so -- may I know -- may I remove my mask --

10 **THE COURT:** So my rule is when you're in the --  
11 outside, you have to follow the GAO's rule. My rule is if  
12 you're vaccinated and you want to take it off, that's fine  
13 with me.

14 **MR. AL-SALAM:** Thank you, Your Honor. I'm fully  
15 vaccinated.

16 **MR. LANIER:** Good morning, Your Honor. Greg Lanier  
17 and Michael Hendershot of Jones Day for NXP.

18 **THE COURT:** Mr. Lanier, I don't think I've seen you  
19 in, I don't know, 20 years.

20 **MR. LANIER:** That's about right.

21 **THE COURT:** Yeah. You look the same.

22 **MR. LANIER:** Well, thank you very much. As you do,  
23 Your Honor.

24 **THE COURT:** So Mr. Lanier and I used to be partners  
25 together.

1 Well, let's get started.

2 Way I do these is we do them term by term, and I don't  
3 know if you've divided up terms or what your plan is, but I  
4 want both folks at the podium at the same time and we just go  
5 back and forth.

6 I do have your PowerPoints, so to the extent that you want  
7 to use PowerPoints, that's fine. But it is kind of a  
8 back-and-forth approach.

9 So for Impinj, what's your plan?

10 **MR. AL-SALAM:** Thank you, Your Honor.

11 I will argue the first three terms, and my colleague  
12 Mr. Keese will argue the next three.

13 **THE COURT:** Okay.

14 Mr. Lanier.

15 **MR. LANIER:** And just so it's clear what three terms  
16 we're talking about, are you planning to start with the '597  
17 patent, the one remaining term?

18 **MR. AL-SALAM:** Correct. And then the first two terms  
19 of the '266 patent.

20 **MR. LANIER:** Thank you.

21 And Mr. Hendershot will argue the first term in the '597  
22 patent, and I will take the terms in the '266 patent. And it  
23 sounds like we're going to go in the order that we presented  
24 them, and that's great with us.

25 **THE COURT:** Correct. Okay.

1 I think -- all right. Well, let's get started there.

2 **MR. AL-SALAM:** Shall I begin, Your Honor?

3 **THE COURT:** Hold on.

4 **MR. AL-SALAM:** Okay.

5 **THE COURT:** Okay. So as I understand it, with  
6 respect to the '597, the claim term is "the first and second  
7 intermediate nodes are coupled together and are coupled to  
8 ground," correct? We on the same --

9 **MR. AL-SALAM:** Yes, Your Honor.

10 **THE COURT:** So Impinj's proposal is just the  
11 plain-and-ordinary meaning, that there is no construction  
12 necessary. And NXP wants me to construe it as "the coupling  
13 of the first and second intermediate nodes via capacitors to  
14 ground."

15 So you're -- you want me to include this limiting term  
16 "via capacitors," correct?

17 **MR. HENDERSHOT:** Correct, Your Honor.

18 **THE COURT:** Okay. My inclination is to not so limit  
19 it, so you can go first.

20 **MR. HENDERSHOT:** Thank you, Your Honor.

21 So I will refer to the hard copies of our slides, if  
22 that's okay.

23 **THE COURT:** I believe I have your hard copies. And  
24 do you want -- do you want them on the screen?

25 **MR. HENDERSHOT:** I can work off a hard copy. I'm

1 slightly old fashioned that way, if --

2 **THE COURT:** Okay. That's fine.

3 **MR. HENDERSHOT:** So the -- the term in the  
4 constructions begin on Slide 4 for the '597 patent.

5 **THE COURT:** I have it.

6 **MR. HENDERSHOT:** And it -- this appears in Claim 12,  
7 and I -- I note that because this is a dependent claim. This  
8 is not a case where we're arguing to limit all the claims or  
9 the whole of an invention to a particular embodiment disclosed  
10 in the patent.

11 The patent has an independent claim, Claim 1, from which  
12 12 depends, that is presumably broad enough to cover multiple  
13 embodiments disclosed in the patent. We're not trying to  
14 limit Claim 1 in that regard. The patentee could have stopped  
15 there with Claim 1 and relied on a claim that covers the  
16 embodiments in the patent, but it proceeded to add three  
17 specific dependent claims, one of which is Claim 12 where this  
18 term appears.

19 The patent we think is really clear. It ties these  
20 dependent claims to very specific embodiments and they're  
21 directed to cover those for reasons the patent explains, so  
22 we're just trying to construe is term in Claim 12, this  
23 dependent claim, consistent with the disclosure to which it's  
24 tied in the patent.

25 If I could refer to Slide 5.

1 And this is isn't on the slide here, but the -- the '597  
2 patent at Column 8 beginning at line 49 through line 62  
3 explains first with respect to these intermediate nodes that  
4 we're dealing with in this -- in Claim 12 and how they're  
5 coupled, there are three general configurations to treat these  
6 intermediate nodes AN.

7 And it continues on. Each of the configurations provides  
8 unique performance advantages depending on the phase and  
9 amplitude relationship between the negative and positive RF  
10 antenna.

11 So it says for these intermediate nodes, there are three  
12 general configurations, and each one has a unique performance  
13 advantage. So if you refer to Slide 5, there's a passage from  
14 Column 9 on the left and then the three dependent claims I've  
15 been referring to on the right.

16 You have Claim 10 that says the rectifier in which the  
17 first and second intermediate nodes are floating, so they're  
18 floating, which in the parlance of this patent means they're  
19 not connected to ground and they're not coupled to one  
20 another.

21 And the spec provides that Diagram 900C shows an  
22 embodiment that is configured for what's called nodal  
23 averaging. They have three averaging techniques that are  
24 three techniques that were referenced.

25 In the nodal averaging configuration, the individual nodes

1 A1 -- AN1 to ANN are left to float so that -- that is the  
2 purple on the left from the spec. It maps directly to  
3 Claim 10 on the right, which is a dependent claim from  
4 Claim 1.

5 Similarly, the blue in the specification and in Claim 11.  
6 Claim 11 on the right provides the first and second  
7 intermediate nodes are coupled together and are floating  
8 together, which corresponds to the description for local  
9 averaging in the spec on the right which is the second of  
10 those three configurations. The patent talked about having  
11 unique advantages.

12 **THE COURT:** How's the court reporter doing with his  
13 speed?

14 (Off-the-record discussion.)

15 **THE COURT:** You may proceed.

16 **MR. HENDERSHOT:** Thank you.

17 **THE COURT:** One of the reasons we have to get back in  
18 the courtroom is so that people remember to slow down.

19 **MR. HENDERSHOT:** Feel free to tell me when I need to.

20 **THE COURT:** Go ahead.

21 **MR. HENDERSHOT:** And then the third, the green  
22 language from the spec and the Claim 12 on the right, Claim 12  
23 is the one that we're dealing with here where this term  
24 arises.

25 **THE COURT:** Right.

1           **MR. HENDERSHOT:** This is the global averaging  
2 configuration where the specification provides the individual  
3 nodes AN1 through ANN are coupled together, and they're  
4 connected to ground.

5           So you have these three dependent claims, 10 and 11 and  
6 12, that are very clearly drawn to three particular  
7 embodiments that the patent teaches have unique performance  
8 advantages. We're dealing with Claim 12, this dependent  
9 claim.

10           And quickly if you look at Slide 6, there are three  
11 figures that are part of the Figure 9 that further illustrate  
12 these embodiments that these claims are specifically drawn to.  
13 On Claim 6, this is -- on Slide 6, this is Claim 10 where the  
14 intermediate nodes are floating. And you'll see the -- the  
15 nodes are the AN items that we've put rectangles around in the  
16 figure. Those are floating, so they're -- they're not coupled  
17 together in the claim, and they're not depicted as being  
18 connected or coupled together or to ground.

19           Slide 7, similarly shows Claim 11 and Figure 9D. And  
20 Claim 11 talks about the first and second intermediate nodes  
21 being coupled together and floating together.

22           And you can see the difference in this figure on the left,  
23 is that you now have the nodes, which are those dots marked by  
24 AN, connected to the same line, and each of those are coupled  
25 to one another by a capacitor. And they're floating together,

1 so they're coupled together by a capacitor but they're not  
2 connected to ground.

3 And then Slide 8 is Claim 12, which is the claim we're  
4 dealing with. This is the third of those figures that the  
5 specification shows on the right is --

6 God bless you.

7 **THE CLERK:** Thank you.

8 **MR. HENDERSHOT:** An embodiment that is configured for  
9 global averaging, which we talked about where the nodes are  
10 coupled together and connected to ground.

11 Now, this is --

12 **THE COURT:** So I understand you had set this out  
13 before. The Federal Circuit law is that the claims of a  
14 patent may not be limited to an embodiment, which is what  
15 you're arguing, even if it is the only embodiment described in  
16 a patent, unless there's disavowal.

17 So where's -- or -- I mean -- how do I get past that  
18 established law in *Phillips*?

19 **MR. HENDERSHOT:** So the quote that they provided from  
20 *Phillips* in their brief, Your Honor, I would not dispute its  
21 application to the independent Claim 1. There are multiple  
22 embodiments that independent Claim 1 embodies, and we've seen  
23 three of them here. We're not trying to limit that or the  
24 invention to a single disclosed embodiment.

25 Here, we have dependent claims that are drawn to more

1 specific embodiments that we think are plainly linked and  
2 clearly addressed to disclosures in the specification. And  
3 we're trying to construe --

4 **THE COURT:** What's -- what's your best Federal  
5 Circuit case that describes this as an appropriate analysis  
6 for the court? If I don't rely on *Phillips*, what -- what do  
7 you want me to rely on?

8 **MR. HENDERSHOT:** I think you can rely on *Phillips*,  
9 Your Honor. And if I could refer you to Claim 10 -- or  
10 Slide 10, rather. I apologize. You need to construe the  
11 plain, ordinary meaning of the term as *Phillips* instructs in  
12 the context of the claim term. Here -- and other claim  
13 language.

14 Here, we have dependent Claim 12 talking about the  
15 coupling of intermediate nodes. And Claim 12 depends from  
16 Claim 1, which we have excerpted here on the right-hand side.

17 Claim 1 provides that these nodes connect transistors in  
18 what are these -- called these synchronous elements in the  
19 image on the left. And they need to form a charge  
20 accumulating path between the beginning and the end of those  
21 elements on the left.

22 So the way that works in this patent I'll try to be brief  
23 is you build up charge on one capacitor on the left, and it  
24 gets passed to the next one on the right, and then that gets  
25 passed further down, and you build up and pass charge that

1 accumulates along the path as you go left to right in this  
2 image.

3 If you are connecting these nodes, one of which is in the  
4 middle of the orange path and one of which is in the middle of  
5 the red path, to one another -- if you're coupling them, and  
6 you just adopt a plain -- I guess my real issue is with the  
7 plain-and-ordinary meaning that they're advancing 'cause if  
8 you directly connect those -- sorry -- if you directly connect  
9 those, as they're suggesting the plain-and-ordinary meaning  
10 would cover, the invention wouldn't work, and it would break  
11 the claim language from which Claim 12 depends.

12 Because if you're directly connecting the node at A1 to  
13 ground and the node in the middle of the red path at -- at --  
14 in the -- and AN2 to ground, that's a short circuit. And all  
15 of your charge halfway across the first orange path is going  
16 to go straight to ground and not accumulate. And all of your  
17 charge halfway along the red path is going to go straight to  
18 ground and not accumulate.

19 **THE COURT:** Right. But you want me to construe it to  
20 include that the -- that the method includes capacitors. And  
21 that suggests that that's the only possible way that it could  
22 happen or that someone skilled in the art would expect it to  
23 happen, which limits, obviously, the construction.

24 So where -- how can I do that?

25 **MR. HENDERSHOT:** Your Honor, I think a -- a person of

1 ordinary skill in the art reading the patent -- and our expert  
2 testified to this -- would understand that dependent Claim 12  
3 to be directed to that figure in 9E. And 9E uses -- the  
4 description of 9E uses the same language recited in Claim 12,  
5 and it depicts this coupled by a capacitor. That's the sole  
6 embodiment, and I don't have the case in front of me from our  
7 briefing, and I can pull that in a moment.

8 **THE COURT:** If it's -- I don't happen to be looking  
9 at it right now. I'm just looking at my notes.

10 **MR. HENDERSHOT:** Yeah.

11 **THE COURT:** So if it's in your -- if it's in your  
12 briefing, then you can rely on that.

13 All right. A response.

14 **MR. AL-SALAM:** Thank you, Your Honor.

15 Can you put up the slides.

16 **MR. KEESE:** Absolutely.

17 **MR. AL-SALAM:** The court is correct.

18 (Demonstrative published.)

19 **MR. AL-SALAM:** The only issue here is should this  
20 claim be limited to coupling through capacitors. And there is  
21 nothing in the specification or file history that requires  
22 that the claim language be limited in that manner.

23 I --

24 (Demonstrative published.)

25 **MR. AL-SALAM:** The -- the court is correct that the

1 presumption is that claim language should not be limited to  
2 preferred embodiments. And I have never seen a case and -- if  
3 counsel corrects me, that's fine.

4 I have never seen a case that says that principle only  
5 applies to independent claims and doesn't apply to dependent  
6 claims. It's a general principle of claim construction, that  
7 you don't limit the claims to the preferred embodiment absent,  
8 as you said, disavowal. And there's no disavowal anywhere in  
9 the specification or the prosecution history.

10 At no time did -- in the specification, does it say the  
11 invention requires coupling to ground via capacitors. And no  
12 time in the prosecution history was prior art distinguished on  
13 the basis that it didn't couple to ground via capacitors.

14 And -- that should be the end of it. But -- but the fact  
15 is that the -- the specific embodiments that are relied upon  
16 by -- by defendant are described in the patent as embodiments.

17 They say for each, and there's two. There's 9C, and -- I  
18 mean, sorry 9E and 10C. And for each, they're described  
19 themselves -- as an embodiment. They're not limiting the  
20 claims.

21 In addition, there is no dispute -- now, the counsel was  
22 arguing that, well, if there was -- if it just was connected  
23 directly to ground, then it wouldn't work. But that's not the  
24 only option.

25 There are other ways to couple it to ground not using a

1 capacitor. And our expert Dr. Smith has explained that, that  
2 you can couple versus other elements, like transistors,  
3 resistors, inductors. I don't even think that issue is --  
4 is -- is disputed.

5 In fact, NXP in their response says they're not arguing  
6 that every coupling has to be via capacitor, so we know that  
7 there are other ways to couple, including couple to ground.

8 And to go --

9 (Demonstrative published.)

10 **MR. AL-SALAM:** -- farther, there are other  
11 illustrations of these -- this invention that don't even show  
12 capacitors.

13 **THE COURT:** I'm going to cut you off --

14 **MR. AL-SALAM:** Okay.

15 **THE COURT:** -- because it's now 9:20. I understand  
16 your arguments, and --

17 **MR. AL-SALAM:** Thank you.

18 **THE COURT:** -- I don't -- we have to finish by -- I  
19 have another hearing at 11:30. So the way I do these  
20 things -- frankly, I haven't done one in such a long time in  
21 person, I forgot to mention, I don't frankly care which --  
22 which terms we do in terms of order. The time is yours.

23 And so what I tell lawyers is that you pick the most  
24 important ones that you want to talk about, and you've got the  
25 time, and if you run out, you run out of time. So I -- I

1 think I've heard what I need to hear on this one.

2 Where do you want to go next?

3 **MR. AL-SALAM:** Thank you, Your Honor.

4 **MR. HENDERSHOT:** Thank you, Your Honor.

5 **MR. AL-SALAM:** The -- the next term, and this is the  
6 order, is "processor block" for the '266 patent.

7 **THE COURT:** Right. And that's -- and I'll let you --  
8 is that the one you want next?

9 **MR. AL-SALAM:** Yes, Your Honor.

10 **THE COURT:** Okay. And then, Mr. Lanier, I'll let you  
11 pick the next one. It can be in order or not. Whatever you  
12 think's most important in case you run out of time, you run  
13 out of time. All right?

14 **MR. LANIER:** Thank you, Judge.

15 **MR. AL-SALAM:** And then to be -- maybe I'm overly  
16 optimistic, but we only have five terms to go, and I think  
17 disputes are relatively narrow, so I'm hopeful that we will  
18 get through all of them within the court's time.

19 **THE COURT:** I do, too. But you're lawyers so --

20 **MR. AL-SALAM:** So --

21 **THE COURT:** Okay. "Processor block."

22 **MR. AL-SALAM:** So --

23 (Demonstrative published.)

24 **MR. AL-SALAM:** -- there's -- there ever been two  
25 disputes on "processor block." Well, there were three.

1 They -- they originally wanted the construction as reflected  
2 on the screen, that the processor block has to receive power  
3 from another subsection of the RFID IC. They withdrew that,  
4 and that left two disputes. One is whether the processor  
5 block has to be a portion of the claimed IC or can be an IC in  
6 itself.

7 That's one of the disputes, and we, as I advised  
8 Mr. Lanier at the beginning, are willing to withdraw that  
9 argument because I don't think it has any relevance to the  
10 dispute between the parties. So we are willing to limit the  
11 construction to a -- that the processor block is a portion of  
12 the claimed IC.

13 And that narrows the dispute to one issue, Your Honor.  
14 And that is whether the processor block has to contain a  
15 processor. And that's the only remaining dispute.

16 **THE COURT:** Okay.

17 **MR. AL-SALAM:** And the -- the -- the fact is there  
18 are various reasons why the processor block does not have to  
19 contain a processor, and the most -- the most persuasive is  
20 that the specification describes the processor block that  
21 maybe, quote, implemented in any way known in the art, for  
22 example, by combinations of one or more of a processor memory  
23 decoder, encoder, and so on, end quote.

24 Now, it says "processing block." It doesn't say  
25 "processor block." But a key issue is whether there's a

1 dispute that the disclosure of a "processing block" in the  
2 specification is meant to be the same as the claimed  
3 "processor block." And we -- we would submit that it is  
4 because the functions are the exact same.

5 What these claims relate to is when -- and I don't think  
6 we have to understand this in detail. But when you have an  
7 RFID tag, a passive tag, it gets all its power from the radio  
8 waves it receives from the reader. It has to harvest the  
9 energy from those waves to power its own IC.

10 And the court will hear more about variable impedance, but  
11 the essence is that if you can match the impedance between IC  
12 and the -- the -- the resonant frequency of what's coming in  
13 on the antenna, you can harvest more power.

14 So what this processor block does is it operates at a  
15 lower frequency to try to -- when it doesn't have enough power  
16 to operate, it operates at a lower frequency if it has enough  
17 power to tune. And hopefully if it can tune to therefore  
18 harvest more power, then it is able to then switch to the  
19 protocol phase where it can then communicate with the reader.

20 The -- the description of the processing block in the  
21 specification explains that it can be implemented in any way  
22 known in the art.

23 Now, defendants and their expert have relied on that  
24 disclosure to interpret "processor block" in the claims in  
25 various ways, including the original argument that it required

1 power from another subsection. But they can't have it both  
2 ways.

3 We -- we agree that "processing block" disclosed in the  
4 specification is the same as the "processor block" that's  
5 claimed. And it makes it clear that that is not limited to a  
6 processor. And even just in common sense, neither of the  
7 parties use processors in their -- in their -- in their IC's.  
8 A processor, if we're talking about a general purpose  
9 processor, consumes too much power and takes too much space to  
10 be put into a small IC tag.

11 Nobody, even on their side, is disputing that people  
12 commercially do not use processors in these tags and for the  
13 IC's. It is -- that's why it's referred to as a "processor  
14 block."

15 Under their construction, we read out the word "block" and  
16 we say, it should have just said processor, even though that  
17 wouldn't make sense in terms of how the parties -- how the  
18 parties' own products work and operate.

19 And for that reason, Your Honor, "processor block" should  
20 not be limited to -- to having a processor.

21 **THE COURT:** Mr. Lanier.

22 **MR. LANIER:** Thank you, Your Honor.

23 And mindful of the court's time and trying to --

24 **THE COURT:** It's your time. I've blocked it out.

25 **MR. LANIER:** Thank you.

1       If I could draw the court's attention to Slide 12 of our  
2 slides. And that just lays out the two competing  
3 constructions as we walked in this morning. Now, we've  
4 resolved the portion issue.

5       We've explained at length in our papers why we think a  
6 "processor block" or processing -- the "processing block" of  
7 the specification and the "processor block" of the claims must  
8 include a processor.

9       So I want to be clear about two things. The first is that  
10 we are not seeking a construction that the "processor block"  
11 is only a processor. We're asking for a construction that the  
12 processor block includes a processor, because as  
13 Dr. van der Weide explained without rebuttal from Dr. Smith,  
14 that's what would be required to accomplish the job of the  
15 technology. It's all in our papers. It's all in what's  
16 submitted, so I won't repeat it.

17       What I did want emphasize, though, was what's on Slide 13.  
18 And there, we depict a couple of different excerpts from the  
19 reports of our two experts that were submitted to Your Honor.

20       And what we notice is that Dr. Van der Weide says  
21 "processing block" or "processor block" is -- it's not a --  
22 it's a coined term. It's not a term of art. It's not one  
23 that persons of ordinary skill in the art would regularly use.  
24 And then he explains why, and we put in our papers why it is,  
25 that it would include a processor, not be limited to one.

1 Dr. Smith actually addresses a different question. He  
2 talks about what someone would have understood about how you  
3 get the job done, a processor block or processing  
4 functionality so he's not even actually addressing the claim  
5 construction issue that's before Your Honor.

6 The last point I would like to make, because there's  
7 extensive discussion in the argument slides that were  
8 submitted to Your Honor about positions taken in another case  
9 involving another patent and another court, that courts  
10 regularly understand terms like this to include processors.

11 And I would draw the court's attention to the *Invensys*  
12 case that was cited by Impinj. It was cited at page 18 of its  
13 opening brief. It's a decision of Judge Davis in the Eastern  
14 District. But they cite it relating to the "configure to"  
15 issue that we'll come to.

16 But if Your Honor is able to look back at page 671 of that  
17 decision, "processing device" is readily recognized by those  
18 skilled in the art as a processor, thereby evidencing  
19 corresponding structure.

20 So the only things we have from any authority before the  
21 court about what the structural language is, there the term  
22 was "processing," but device -- here the term is "processor  
23 block" in the claims -- evidences that it would either be or  
24 at least include a processor. And all we're asking is not a  
25 construction to limit it to a processor but to include a

1 processor.

2 My final point on this one, Your Honor --

3 **THE COURT:** I -- I'm not understanding the  
4 distinction you're trying to make. By definition, if it has  
5 to include a processor, you're limiting it.

6 **MR. LANIER:** Then let me be -- we are seeking not to  
7 limit the processing block to be only a processor. The  
8 processing block must include a processor. It may have other  
9 circuit elements or other circuitry. But it is not -- we are  
10 not reading the term "processor" and "processor block" in this  
11 patent to be exactly the same limits.

12 **THE COURT:** Would your definition or construction, by  
13 definition, require a construction of the word "processor"?

14 **MR. LANIER:** We don't think so, Your Honor.  
15 Processor is a term that I don't think there's any dispute is  
16 well understood by a person of skill in the art. There's been  
17 no discussion about that. "Processing block" or "processor  
18 block" was the term that -- that Dr. Van der Weide addressed,  
19 and other terms were what Dr. Smith addressed.

20 One final point on -- on this one, Your Honor. Since  
21 we've resolved the portion issue, if you look back at  
22 Slide 12, that's where the two competing constructions are,  
23 what we would offer is that if the court is not inclined to  
24 construe "processor block" as requiring a processor, it should  
25 however reject Impinj's proposed construction, which is

1 containing RF analog and/or digital processing limits, because  
2 that provides precisely no guidance, no clarity, no additional  
3 information.

4 It says it's anything. That's literally what it says.  
5 The world of RF analog and/or digital processing elements,  
6 it's hard to imagine what could be there that's not -- what  
7 exists in the universe in electronics that's not included  
8 there, so that provides no guidance at all.

9 So having resolved the portion issue, we'd suggest that --  
10 we ask that the court construe "processor block" to include a  
11 processor and whether -- if the court's not inclined to do  
12 that, we ask that it reject Impinj's additional language  
13 "containing RF," et cetera.

14 **THE COURT:** Okay. A response.

15 **MR. AL-SALAM:** Yes. Thank you, Your Honor.

16 Mr. Lanier did remind me and I should have raised it  
17 because it's not in the papers but it's in our slides. We  
18 did -- the parties did argue this same issue -- and when I say  
19 "same," it's the same term in a patent that Impinj owns that  
20 relates to the exact same technology. And it's also --  
21 relates to tuning, and they use the same language. And we  
22 made that argument to Judge Albright in the Western District  
23 of Texas. He adopted our position.

24 This court is not bound by that decision. But I think  
25 it's persuasive. My own mind, it should be collateral

1 estoppel, but I don't think it rises to that level.

2 In terms of --

3 **THE COURT:** Collateral estoppel, did you -- so you  
4 were both litigating in front of --

5 **MR. AL-SALAM:** Yes.

6 **THE COURT:** And it's the same patent?

7 **MR. AL-SALAM:** It's not same patent. It's -- it's a  
8 patent -- it's the '198 patent.

9 **THE COURT:** But this one says -- so I'm looking at  
10 your Slide 12 now -- that the court just said  
11 plain-and-ordinary meaning.

12 **MR. AL-SALAM:** That's correct. That -- but you'll  
13 see that Impinj -- I mean --

14 **THE COURT:** Why aren't you suggesting  
15 plain-and-ordinary meaning here?

16 **MR. AL-SALAM:** That's a good question, Your Honor.  
17 I'm not sure why we're taking a different position. We could  
18 live with plain-and-ordinary meaning.

19 Because -- and to get back to -- because I understand  
20 counsel's saying that we shouldn't have this -- this  
21 discussion of what it could include. And the other -- the  
22 other option, to me, is it could be interpreted as it  
23 specifically says in the specification. A processor block --  
24 processing block, which is the same, maybe implemented in any  
25 way known in the art, for example, by combinations of one or

1 more of a processor, memory, decoder, encoder, and so on.

2 Now, the construction that we've -- that we proposed, we  
3 think it's -- nobody disputes that these were known ways to  
4 implement a processor block. And that being, it contains  
5 analog and/or digital processing elements.

6 **THE COURT:** So Mr. Lanier, what about that definition  
7 that's in the -- looks like Column 6, 60 to 7-5, right?

8 Processor block 444, which is the figure, maybe  
9 implemented in any way known in the art such as by  
10 combinations of one or more processor, memory, decoder, or  
11 encoder -- I don't know what I would say for the "and so on."  
12 But that has your processor in it. And then it has other  
13 elements. And it's in the patent.

14 **MR. LANIER:** That's -- that's correct, Your Honor.

15 I would respond in two ways. First, I would suggest that  
16 if there is -- having resolved the portion issue, if we are  
17 not to construe "processor block" to include a processor, then  
18 I agree with Mr. Al-Salam that there's no need to construe it  
19 at all.

20 But if the court is inclined to construe it, it should  
21 construe it consistent with that disclosure in the  
22 specification and not with the language proposed by NX -- or  
23 Impinj in their proposed construction.

24 **THE COURT:** I think the question is if this case goes  
25 to trial, are the experts going to be fighting about the

1 meaning of a "processor block." And if I look at your impact  
2 statement with respect to this term, I'm not sure that this  
3 tells me anything.

4 **MR. AL-SALAM:** May I --

5 **MR. LANIER:** Sorry.

6 **THE COURT:** So -- so is this going to really be an  
7 issue or not? And if it is, then my inclination would be to  
8 go back to the -- to the language that's there.

9 **MR. AL-SALAM:** The way I understand it, Your Honor,  
10 if the court were to adopt the NXP construction limiting it to  
11 a -- to including a processor, it -- it would be dispositive  
12 on infringement because they don't have a processor, neither  
13 do we, in these IC's. So that's where I think it would be  
14 dispositive.

15 I do want to point out that if you really read the claim  
16 this processor block is not really an important part of the  
17 claim insofar as what's important is what it does. I mean,  
18 this -- it's -- delineates -- the claim delineates exactly the  
19 functions of the processor block, which is what matters.

20 And I believe that there is no dispute that the processing  
21 functionality in the NXP -- that -- well, I'll put it this  
22 way, that NXP has processing functionality in their IC's.

23 And if it's -- if this term is not limited to "including a  
24 processor," I do not believe NXP would have a non-infringement  
25 position just on the meaning of "processor block." They may

1 have some others, but not on that meaning. That's my  
2 understanding.

3 **MR. LANIER:** I believe that correctly summarizes what  
4 our position would be, that if the court construes "processor  
5 block" -- or -- yeah, "processor block" to "include a  
6 processor," that would be a non-infringement position for us.

7 I do think, however, that at trial, what the parties may  
8 be arguing about is whether the -- whatever the circuitry that  
9 Impinj points to to say this is the processor block, however  
10 it is construed or not construed by the court, whether it does  
11 the things that are required by the claim.

12 And that's actually more related to the "configured to"  
13 issue than the "processor block" issue. So there will be a  
14 fight about whether whatever is accused does those things.

15 But I don't think that once the court construes this term  
16 or declines to construe this term, there'll be much of a fight  
17 about the processor itself.

18 **THE COURT:** Okay. I think -- I need to go back and  
19 look at it more closely, but I think I understand your  
20 positions.

21 All right. Next one.

22 **MR. LANIER:** Thank you. Your Honor, the next one in  
23 order was "configured to." There had been some discussion  
24 about whether "processor block configured to" was one term or  
25 three terms. We treated "configured to" separately because

1 "configured to" appears at other places in the same claims  
2 used with respect to other circuitry, so we thought it made  
3 sense to talk about "configured to" separately.

4 **THE COURT:** Okay. That's the one you want to turn  
5 to?

6 **MR. LANIER:** Yes, please.

7 **THE COURT:** Okay. So let me ask you this question.  
8 First of all, I construed "configure" the last time, I  
9 believe. But your construction seems to me to be repetitive  
10 and unnecessary. And I say that because when I try a case and  
11 I've -- and I'm giving the jury terms that have been  
12 construed, in effect what I'm telling them and what their --  
13 what we explain is that they are separating the definition  
14 that I am giving them and putting into the claim so that they  
15 can understand it.

16 So when you say "made or designed to perform a specific  
17 function," I don't know how that helps when in the claim  
18 language, the specific function is defined because it follows  
19 the word "to," so it adds nothing in my view.

20 And I don't think that there's a -- really a dispute  
21 that -- with respect to "made" or "designed." It's -- it's  
22 this issue of "to perform a specific function," which I view  
23 as repetitive to what follows the actual word.

24 Go ahead.

25 **MR. LANIER:** Thank you, Your Honor.

1 I think that's an excellent point, Your Honor. And in  
2 thinking about this issue to come here this morning, I looked  
3 back at Your Honor's claim construction order. It's Docket  
4 102, and the relevant pages are 10 and 11, and I looked back  
5 at the transcript of the argument as well to see what the  
6 discussion was about this point.

7 I do think Your Honor is correct, that it's not necessary  
8 to include "to perform a specific function" because the claim  
9 identifies the specific functions.

10 But I do think we need to look at "configured to," just  
11 those words.

12 Now, in Your Honor's previous claim construction order,  
13 there's actually two constructions of this term. On page 10,  
14 the court construction is -- this was in the context of a term  
15 that had "protect" in it, so I'll use the word "protect."  
16 It's not part of this claim we're talking about here. "Is  
17 made to protect" then it goes on.

18 At page 11, the court's construction was "is suitable for  
19 protecting." We think those are both almost all the way there  
20 to what the construction would be because we think what the  
21 court should do here with the benefit of that order and  
22 thinking about it in terms of this patent is construe  
23 "configure to" to be either or both of "is made to" or  
24 "suitable for without modification."

25 And we ask that the court include those words in that

1 construction. And the reason that we're driven to do that is  
2 in part because of Impinj's reply and in part because of their  
3 argument slides.

4 So if I could direct Your Honor to page 18.

5 **THE COURT:** Eighteen of...?

6 **MR. LANIER:** Of our slides.

7 **THE COURT:** Okay.

8 **MR. LANIER:** My apologies.

9 **THE COURT:** I'm there.

10 **MR. LANIER:** And this is consistent with comments  
11 Your Honor made talking about typhoon and other -- aspects in  
12 other cases at the previous hearing. Impinj is not taking the  
13 position that the claims encompass IC's --

14 **THE COURT:** Mr. Lanier.

15 **MR. LANIER:** My apologies.

16 **THE COURT:** When you read -- when any lawyer reads,  
17 they go too fast.

18 Go ahead.

19 **MR. LANIER:** I have been battling this for a long  
20 time when I --

21 **THE COURT:** You and lots of other lawyers. You're  
22 not the only one.

23 **MR. LANIER:** Indeed. My daughter suffers from the  
24 same.

25 "Impinj is not taking the position that the claims

1 encompass IC's that are incapable of performing the recited  
2 functions without being materially modified."

3 "On the other hand, if the ICs as sold can perform the  
4 recited functions" -- goes on -- "then they are configured  
5 to." That's all written there so I didn't read every word  
6 from that quote, but in its front of Your Honor.

7 Then on their argument Slide 15, Impinj says it slightly  
8 differently but similarly. And they say that "there's no  
9 dispute that the product must be configured to as shipped to  
10 directly infringe." We agree.

11 So what we suggest is to avoid any confusion for the jury  
12 consistent with Your Honor's construction, consistent with the  
13 positions taken on reply and in the slide submitted to Your  
14 Honor for argument, that the court's construction for  
15 "configured to" be "is made to or suitable for without  
16 modification." That's it.

17 And then the -- the functions would follow, wherever that  
18 term is used. And if the court thinks --

19 (Simultaneous colloquy.)

20 **MR. LANIER:** Oh, my apologies.

21 **THE COURT:** A response on that recommended change.

22 **MR. AL-SALAM:** No, Your Honor. We -- we would not  
23 agree to that.

24 I want to be clear. The claim is clear, as you said, what  
25 the processing block must do. It must perform those

1 functions. At trial, it either will be shown that it does  
2 that or it doesn't do that.

3 I worry that what they're seeking, especially with this  
4 added language, is just to create mischief. Let me give you  
5 the example.

6 In the *Finjan* case, which has been cited to the court,  
7 the -- the issue was whether or not the -- it was configured  
8 to perform the claimed functions when it -- when as shipped,  
9 it wouldn't do that unless you had a key. You had to unlock  
10 that functionality with a key.

11 And what the court said was as long as you don't have to  
12 reprogram it -- as long as you're just unlocking it, it's  
13 still within the claim language.

14 Now, on the same time in the *Radware* case, which was also  
15 cited by them, which I happened to be involved in litigating,  
16 I know what the exact issue was. F5 designed around the --  
17 the patent by changing the code. They took out one line of  
18 code. The plaintiff said, oh, well, that's still capable of  
19 performing the -- the asserted method because all they have to  
20 do is write one line of code. And Judge Whyte, analyzing all  
21 the cases, found that that's where you draw the line.

22 If -- if a computer inventions -- you draw the line  
23 where -- whether or not you have to reprogram it. And all of  
24 their cases are consistent with that. And what that relates  
25 to is the ambiguity that arises in computers because computers

1 are always capable of being reprogrammed. So what does it  
2 mean when you say a computer is configured to do something?

3 Now, what I worry here is what they're talking about --

4 (Simultaneous colloquy.)

5 **MR. AL-SALAM:** -- something that you have to do to  
6 make it work the way it says.

7 **THE COURT:** You don't disagree with the phrase "made  
8 to." That is, you don't disagree that -- you had suggested in  
9 the first round that "configured" was the same as "positioned  
10 such that."

11 **MR. AL-SALAM:** Yeah, that -- that first round -- let  
12 me just mention that quickly. "Made to" I think is fine. But  
13 I don't know what it adds to "configured to," but I think  
14 "made to" is fine.

15 The first round, the real issue was -- it -- whether  
16 that -- the contact pads were configured to protect the  
17 passivation layer during etching, and the argument was whether  
18 you actually had to do etching or whether it's just -- it  
19 could have been done.

20 To me, it wasn't really an argument about "configured to"  
21 as opposed to whether or not the etching method had to be  
22 practiced to actually infringe the claim. And we said no, all  
23 that matters is that it could protect the passivation layer if  
24 you did etching, that the method part shouldn't be included.

25 But you're right that "designed to" bothers me more than

1 "made to" because "designed to" seems to incorporate some  
2 intent element about what exactly was the designer thinking.

3 If we can't prove that their ICs do this, then we -- we  
4 can't prove infringement. But I think we can prove their ICs  
5 do this, and if they do it, this isn't like a computer that  
6 somebody has to reprogram. Maybe there is something the  
7 customers have to do to turn this on. I don't know.

8 But as long as they're not changing circuit design, then  
9 it should be that it's configured to do this. And I have no  
10 doubt in my mind that -- in fact, that they're intending that  
11 this tuning -- this tuning ability be in the circuit.

12 **THE COURT:** In -- on page 10 of my claim construction  
13 order from the first go-round, I provide you with the  
14 authority in terms of how "configured to" has been construed  
15 in other cases. And that the -- doesn't generally require the  
16 function to be actually performed.

17 It -- do you -- I mean, I'm going to go back and re-read  
18 what I already provided you.

19 Do you take any issue with that paragraph at line 7  
20 through 20 for me to consider this go-round? Because it seems  
21 to me that the issues are the same.

22 Anything to add?

23 **MR. LANIER:** Something to add, Your Honor. We take  
24 no issue with that, what's there. We do think the court  
25 should add "without modification," and I will cite very

1 briefly to three things that are not mentioned in that  
2 paragraph of the court's opinion. So we don't take issue with  
3 it. We do think it should go one step further.

4 The three things I will cite are, in fact, the *Finjan* case  
5 because the *Finjan* case relies heavily on the *Fantasy* case,  
6 and all the main cites are in the record. But we're talking  
7 about pages [sic] 1205 basically. And the key there, *Finjan*  
8 relying on *Fantasy*, is -- the key sentence is "infringement  
9 occurred because the code was written in such a way as to  
10 enable a user of that software to utilize the function without  
11 having to modify that code" -- modify.

12 The *Solocron* case that Impinj presented to the court at --  
13 in their opening belief, again, on -- on this issue. And  
14 *Solocron* is interesting because there, the court did  
15 determine that "configured to" has its plain meaning but it  
16 said what the plain meaning was, which the court understands  
17 to require not merely being capable of being configured but,  
18 rather, being actually configured.

19 And then lastly, I would call the court's attention to  
20 Your Honor's own comments at that last argument on pages 42 to  
21 43 of the transcript. And there, Your Honor, was in a  
22 discussion with my now retired partner Mr. Whitcomb about  
23 *Typhoon*, and you stated -- and we think -- we agree completely  
24 with this, that *Typhoon* was rejecting an argument that a  
25 device that could be modified -- and emphasis on "modified" --

1 to perform the function was sufficient.

2 We think that characterization of the law is exactly  
3 right. And that's why we suggest that "made to or suitable  
4 for without modification," the common theme of all the cases  
5 in Your Honor's own analysis should be the construction.

6 **MR. AL-SALAM:** May I respond briefly?

7 **THE COURT:** It's your time. I think I understand the  
8 argument.

9 **MR. AL-SALAM:** Okay. I'll just point out it was  
10 without modification that the case that was cited, the *Finjan*  
11 case and *Fantasy Sports*, they're talking about modification to  
12 writing the code.

13 It doesn't mean -- and that's why I had "material  
14 modification" in our brief. And when I say "material  
15 modification," what -- everybody can take almost anything -- I  
16 can take a -- probably a cell phone and turn it into a bomb or  
17 something. I can take -- something on this table and make it  
18 into a hammer, but --

19 **THE COURT:** I get it.

20 **MR. AL-SALAM:** Thank you.

21 **THE COURT:** Do you --

22 **MR. LANIER:** We would not dispute "material  
23 modification." We would -- we would accept that.

24 **THE COURT:** Okay. So everybody would agree to "made  
25 to or suitable for without material modification"?

1           **MR. AL-SALAM:** I would not, Your Honor. I just want  
2 to object because I think that creates an ambiguity that is --  
3 is just mischief.

4           What I'm arguing is if they can show that their ICs have  
5 to be changed by the customer, I -- I don't know how they're  
6 saying they're changed. In principle, I agree with that. But  
7 I don't want it in the construction. I don't think it's  
8 proper in the construction. And it just adds an ambiguity as  
9 what "material modification" means.

10          Are they redoing the circuit? Are they rewiring it?

11           **THE COURT:** Yeah, but isn't that what you just  
12 argued?

13           **MR. AL-SALAM:** Yes.

14           **THE COURT:** That --

15           **MR. AL-SALAM:** But then we're going to have interpret  
16 "material modification." And for me, if they have to rewire  
17 the whole circuit, then I would agree that's a material  
18 modification.

19          If they have to simply turn on the functionality, such as  
20 was done in *Finjan*, that's not material.

21          If they have to do -- I mean, I know that the --

22           **THE COURT:** It's -- the -- they're -- there is a  
23 sweet spot in between, and it could be that -- that that  
24 construction is appropriate and what we're -- what is required  
25 is a further ruling as to whether or not in this particular

1 case, that modification was material.

2 I don't -- I don't know that it's the jury's decision in  
3 that kind of case. It seems to me to be -- it would require  
4 an analysis as to whether or not in this particular case, the  
5 patent covers whatever the modification was to the extent  
6 there was a modification.

7 But it also seems to me that leaving it without refinement  
8 may create more problems in a trial than not, so I'll have to  
9 think about it.

10 **MR. AL-SALAM:** Thank you, Your Honor.

11 **MR. LANIER:** Thank you, Your Honor.

12 **THE COURT:** Okay.

13 Next, we're at plaintiff's. Which one would you like to  
14 discuss next?

15 **MR. AL-SALAM:** I'm going to defer to my colleague  
16 Mr. Keese on this.

17 **THE COURT:** Okay.

18 **MR. KEESE:** Good morning, Your Honor.

19 The first term I will address is actually the fifth term.  
20 We're continuing to go in order. Apparently the prior -- or  
21 the parties had prioritized the terms fairly effectively, and  
22 that is "protocol phase."

23 **THE COURT:** Okay.

24 (Demonstrative published.)

25 **MR. KEESE:** Do you want me to proceed first, Your

1 Honor?

2 **THE COURT:** Yeah. Let me just -- let me just refresh  
3 here.

4 So as I'm understanding the dispute, you believe that NXP  
5 is importing some kind of method requirement into how the  
6 device is supposed to operate?

7 **MR. KEESE:** That's -- that's one of the disputes  
8 here. I actually think the parties have -- have three  
9 disputes.

10 **THE COURT:** Okay.

11 **MR. KEESE:** That's the primary and most important  
12 dispute from our perspective.

13 **THE COURT:** All right. Go ahead then.

14 **MR. KEESE:** So as I was saying, the -- as we see this  
15 term, the primary dispute --

16 (Demonstrative published.)

17 **MR. KEESE:** -- is whether -- is -- the  
18 construction -- the parties' constructions differ on whether  
19 the protocol phase requires a device that is configured to --  
20 configured to, in other words, is able to perform certain  
21 functions or whether it requires that the device actually  
22 sends an -- or receives and responds to reader commands during  
23 the protocol phase. Our contention is it does not.

24 The claim language does not require actually receiving and  
25 responding to commands during the protocol phase. I'll note,

1 Your Honor, that Claim 6, which is the independent claim from  
2 which the asserted claims 8 and 10 depend, is a device claim.  
3 It's a device claim that recites devices configured to, in  
4 other words, able to perform certain functions.

5 Claim 11 is a method claim. Claim 11 actually has these  
6 affirmative steps. Under Claim 11, you would actually have to  
7 communicate. Actually to have send and receive commands to  
8 the extent that was in the claim language.

9 But that's not what Claim 6 is. Claim 6 is a device  
10 claim.

11 I think it's also important to note here, Your Honor, that  
12 a device configured to be able to do something might infringe  
13 even though that device might not ever exit the tuning phase.  
14 The device -- the circuit might not ever get tuned sufficient  
15 to where you could enter the protocol phase. You might never  
16 get a sufficient impedance matching or sufficient power  
17 extraction such that you actually could move on and  
18 communicate.

19 And so you could have a device that's configured to be  
20 able to do that. But in a given situation, it might not do  
21 that and it might not get to a protocol phase every single  
22 time it receives a signal.

23 So we think that's an important distinction.

24 (Demonstrative published.)

25 **MR. KEESE:** There's two other disputes. Again, we

1 think those are a little less important. The first one  
2 concerns this idea we have in our construction a tag, you  
3 know, able -- that the tag is able to receive and respond to  
4 reader commands. And they want to construe it to just the IC.

5 And, again, this is a little bit more secondary, but we  
6 think that the tag being able to receive and respond to reader  
7 commands is appropriate here because while an IC may receive a  
8 signal and demodulate it and then create a response to send  
9 back, it may be that there are components that are external to  
10 the IC itself that are used and actually transmitting or  
11 receiving the RF waves that carry those messages.

12 So, for instance, an antenna may be external to the IC  
13 itself on a tag, and -- so we think it's important to  
14 recognize that it isn't necessarily just the IC that would  
15 send a message or receive a message -- receive through an RF  
16 wave.

17 Now, whether the claim language includes a tag or not, we  
18 just -- we want it to be clear that the IC itself doesn't  
19 necessarily just stand alone in the sending and receiving of  
20 messages.

21 (Demonstrative published.)

22 **MR. KEESE:** The third dispute is whether the phrase  
23 "according to a protocol" should be added to this. And we  
24 think it shouldn't. We think that's superfluous in view of  
25 the remaining claim language of Claim 6 where it already

1 recites this -- that -- that it is configured in a protocol  
2 phase to communicate according to the protocol, so we just  
3 think that this "according to the protocol" language --

4 **THE COURT:** Well, does it do -- does it do any harm?  
5 And -- and the reason I ask that, again, as I -- I know  
6 that -- I know that you all are -- and patent litigators are  
7 all focused on the -- the next step down the line.

8 When I think about claim construction, I'm focused on what  
9 the jury has to see. And so you -- NXP wants me to define a  
10 term called -- in a patent that says a protocol phase, the  
11 "phase" piece suggests -- seems as if you're addressing this  
12 issue of the period, that is, the phase, but you -- where in  
13 your construction do we get the issue of "protocol" defined?

14 And -- and, in effect, they're not defining "protocol."  
15 They're just putting it back in the term, which is what the  
16 jury is going to be instructed on.

17 **MR. KEESE:** Yes. So --

18 (Demonstrative published.)

19 **MR. KEESE:** -- again, we think looking at Claim 6,  
20 that the "according to the protocol" language isn't  
21 necessary -- isn't necessary for this particular portion of  
22 the claim --

23 **THE COURT:** My question was, does it do harm?

24 **MR. KEESE:** I think it is awkward. I'm not sure it  
25 does harm.

1           **THE COURT:**   Okay.

2           Keep going.

3                       (Demonstrative published.)

4           **MR. KEESE:**   That is -- that sums up my argument on  
5           "protocol phase," Your Honor.

6           **THE COURT:**   All right.

7           Mr. Lanier.

8           **MR. LANIER:**   Thank you, Your Honor.

9           I will take the three points Mr. Keese raised in order.  
10          His first point was this actual receipt, that is, the concern  
11          that the construction we propose would require that there --  
12          that it do something rather than be configured to do  
13          something.

14          And I would like to disabuse Impinj of that concern and  
15          assure Your Honor that that's not our position. We are not  
16          importing a method step. What we are simply seeking by our  
17          construction is to give that term "protocol phase" its actual  
18          meaning.

19          The device has to be -- whatever that device ends up being  
20          with the other issues, has to be configured such that should  
21          the protocol phase be triggered, those things then happen.

22          So I want to be crystal clear about that. We are not  
23          saying that it must happen to infringe. It's an apparatus  
24          claim. We get that.

25          And I would draw the court's attention --

1           **THE COURT:** Look.

2           **MR. LANIER:** Oh, sorry.

3           **THE COURT:** Deconstructing your constructions, the  
4 only difference that I'm seeing is that Impinj wants to  
5 include language "a tag is capable of," and NXP wants to say  
6 the RFID C -- IC -- I'm sorry. RFID IC. That's the  
7 difference.

8           **MR. LANIER:** That's correct, Your Honor.

9           **THE COURT:** That's the only difference between your  
10 two constructions other than the last phrase which plaintiff  
11 has said it's -- there's no harm but awkward.

12           So talk to me about that difference.

13           **MR. LANIER:** Yes, Your Honor.

14           And so let's look, if we could, at our Slide 24 'cause  
15 we -- we tried to break it down exactly like Your Honor just  
16 did comparing the two constructions.

17           Let's start with RFID IC. Claim 6, which is the  
18 independent claim from which the two asserted claims depend,  
19 starts off "a radio frequency identification, RFID, integrated  
20 circuit, IT -- IC," and it goes on.

21           Claim 1 express- -- which is not asserted here and not at  
22 issue here, expressly starts off with a tag. So Claim 6 is  
23 drawn to an RFID IC by its very terms. We are not importing a  
24 limitation. We are not looking at the specification. We were  
25 reading the claim. And we know that that's in the preamble

1 phrase, but we know that it matters because that's one of the  
2 very few differences between Claim 6 and Claim 1.

3 So it does breathe life and meaning in there. So we  
4 suggest that its RFID IC because the patentee in drafting the  
5 claim from which the two asserted claims depend used that  
6 phrase. They defined the thing as the RFID IC. That's our  
7 argument, sum and substance, on that one.

8 **THE COURT:** Okay.

9 Response.

10 **MR. KEESE:** Yes, Your Honor. I think it's important  
11 to recognize here that we aren't -- we are not contending that  
12 RFID IC isn't -- isn't part of this, the part of receiving and  
13 responding to messages.

14 What we're worried about is mischief where NXP says, well,  
15 if the IC doesn't include an antenna, then it can't receive --  
16 it can't actually communicate, and so as sold, it doesn't  
17 include everything necessary and isn't configured to as sold.

18 Well, we are -- that's what we're worried about, is -- is  
19 this mischief of the patent itself discussing that a tag might  
20 include antenna components that are external to the IC itself.  
21 And so that's why we -- we added a tag in here was because we  
22 believe that the patent discloses an internal antenna in the  
23 IC. But it also discloses --

24 **THE COURT:** But isn't Claim 1 different from Claim 6?

25 **MR. KEESE:** Yes, Your Honor.

1           **THE COURT:** So -- so if -- if that's the issue, you  
2 would have an infringement claim under 1 but not 6?

3           **MR. KEESE:** I would -- under their interpretation  
4 potentially.

5           **THE COURT:** Okay. So Claim 1 and Claim 6, by  
6 definition, have to be different.

7           **MR. KEESE:** Yes, Your Honor. But what I would say is  
8 the claim language doesn't recite that the RFID IC must  
9 receive and respond to commands. It says that it's must  
10 communicate and our argument here --

11           **THE COURT:** Well, it says the RFID IC -- hmm. I'm  
12 going to have to sit back and look.

13           **MR. KEESE:** So what we're really getting to here is  
14 this idea that there is a phase where the tag is used as part  
15 of this communication. And so our -- our contention is that  
16 as part of that communication, the tag overall -- the  
17 structure overall, which could include an external antenna,  
18 can receive and respond to commands.

19           But it doesn't have to be the IC itself that is sending  
20 those waves.

21           **THE COURT:** Okay. Any response?

22           **MR. LANIER:** Briefly, Your Honor. On that first  
23 point, I think what is called "mischief" is actually really a  
24 recognition of the difference between the two claims and the  
25 difference between direct and indirect infringement.

1       The asserted or the dependent claim for -- or the  
2       independent claim from which have the two asserted independent  
3       claims depend starts off, "a radio frequency identification,  
4       RFID, integrated circuit," and it says that that IC comprises  
5       a bunch of things, including a processor block configured to  
6       in a protocol phase. So whatever that processor block is  
7       subject to the court's construction and their -- and their  
8       response to that, that processor block must be able to do  
9       these things.

10       So this isn't even really about the tag or the IC. It's  
11       about that processor block, which has to be in the IC, which  
12       is the RFID IC. That's why we put that in there.

13       I'm prepared to address the "is capable of" if Your  
14       Honor's ready, but I'll wait.

15               **THE COURT:** Go ahead.

16               **MR. LANIER:** Okay. On "is capable of," I would draw  
17       Your Honor's attention to our Slide 26. And there, we put the  
18       parties two constraining [phonetic] -- contrasting  
19       constructions of "protocol phase" and offer -- and also some  
20       of the agreed constructions, including "tuning phase." Now,  
21       "tuning phase" sounds a lot like "protocol phase." And that's  
22       according to the parties' agreement "a period during which  
23       tuning occurs."

24       So if it's triggered -- we're not arguing that it has to  
25       happen for there to be infringement. This is an apparatus.

1 It's a device. We understand that.

2 But the device has to be configured such that the tuning  
3 phase, it does the things in the tuning phase, which we've  
4 agreed is the period during which tuning occurs, and it's not  
5 "is capable of," but if triggered, there is a period during  
6 which the things that are the protocol phase occurred.

7 That's why we reject "is capable of." We don't think it's  
8 necessary. We don't think it does anything other than run  
9 right into what Your Honor talked about with -- with the  
10 *Typhoon* case or -- or aspects and acuity as well on the  
11 "configured to" point, hypothetical possible infringe.

12 The device as configured must be able to do those things  
13 if and when that phase is triggered. We don't dispute that  
14 it's an if and when. But the device is at issue. And that  
15 device happens to be an RFID IC.

16 **THE COURT:** Okay. So it is true that the parties  
17 agreed on -- on this term "tuning phase" --

18 **MR. KEESE:** Yes.

19 **THE COURT:** -- as being a period during which tuning  
20 occurs?

21 **MR. KEESE:** Yes, Your Honor. And -- I would just  
22 point -- I have a -- a couple of things that I'd like to say  
23 on that. The first is we agreed on "tuning phase." We didn't  
24 think it was material, so I just don't think our agreement on  
25 that particular term on one -- on a -- on a issue we didn't

1 decide to fight about should -- should be imputed to this  
2 second phase. That's --

3 **THE COURT:** Does anybody -- is anybody aware of any  
4 case law, one way or the other, that I need to consider when  
5 parties agree on some other phase and -- or some other  
6 construction when I construe a different term?

7 **MR. LANIER:** I think, Your Honor, there's the general  
8 line of case law that says where a term is used more than once  
9 within a claim, it should be given the same meaning. So  
10 that's, for example, why we treated "configured to" as  
11 differently. I can pull those cites, but Your Honor is well  
12 aware of that general principle.

13 I would rely on that because that gets to "phase."  
14 "Tuning" obviously is not what we're arguing matters here.  
15 It's a protocol phase.

16 **THE COURT:** Anything different?

17 **MR. KEESE:** No, Your Honor. I would just -- I think  
18 the only thing that came to mind for me was the -- the idea  
19 that you have to construe the -- the claim language as a  
20 whole. And I -- I don't think that's -- that's anything  
21 particularly insightful or -- I would like to respond briefly  
22 on the -- the "capable of" issue.

23 And to make one quick point, and that is the idea that  
24 their construction, as I understand it -- and Mr. Lanier might  
25 correct me -- as I understand it would require that once you

1 enter a protocol phase, the device is absolutely configured to  
2 must receive and respond to commands, "commands" plural.

3 I think it is an overstatement of what a person of  
4 ordinary skill in the art would understand from the patent  
5 that you would have to receive multiple commands and respond  
6 to multiple commands be configured to do so once you enter a  
7 phase.

8 I think a person of ordinary skill in the art,  
9 understanding the protocols that are discussed earlier in the  
10 patent, would know that you wouldn't necessarily always  
11 receive and respond to multiple commands as part of being --  
12 trying to communicate according to a protocol.

13 You might not get a reader command asking for information  
14 back, for instance.

15 **THE COURT:** Okay.

16 Anything else on this one?

17 **MR. LANIER:** No, Your Honor. Not from us.

18 **MR. KEESE:** No, Your Honor.

19 **THE COURT:** All right. Who's up next? I think,  
20 Mr. Lanier, back to you.

21 **MR. LANIER:** Yes, Your Honor.

22 And that's "tuning circuit."

23 **THE COURT:** Okay.

24 **MR. LANIER:** Your Honor, "tuning circuit" -- the  
25 slides start on Slide 27 of our slides that identifies the --

1 the dispute here.

2 And really, just summing it down, because I -- I don't  
3 know that I have much new to add to you beyond what we've  
4 briefed, so I will really just sum it up this way: Impinj's  
5 construction removes all certainty or meaning from this term  
6 "tuning circuit," and it does it in two ways.

7 It says "circuit elements" -- we don't know why there  
8 needs to be "circuit elements" as opposed to "circuit." We  
9 didn't propose to construe the term "circuit." We just used  
10 the word "circuit" to identify the circuit that was relevant.  
11 "Circuit elements," we have no idea what that means. The  
12 experts are perfectly capable of saying "that's a circuit."  
13 And juries -- there's no need here to construe the term  
14 "circuit." There's no suggestion "circuit" requires  
15 construction or substitution with "circuit elements."

16 The other problem with their proposed construction is it's  
17 used for "tuning," and if the court were to stop there, I  
18 think the risk is that it's -- it's implicitly that the --  
19 it's tuning anything. There's no definition to what the  
20 tuning is, and we just think that the claim term, which  
21 requires a specific kind of tuning, is explained in the  
22 specification.

23 And, again, as Mr. Al-Salam kindly explained what the  
24 purpose of these -- or what these IC's do, they operate at  
25 different levels of power. Sometimes when they're waiting to

1 get signals, they operate at low power --

2 **THE COURT:** Well --

3 **MR. LANIER:** Oh, sorry.

4 **THE COURT:** So I'll just interrupt. In terms of  
5 Impinj's construction, I agree. I don't know -- I don't know  
6 why you didn't suggest plain-and-ordinary meaning --

7 **MR. KEESE:** Your Honor, so --

8 **THE COURT:** -- given what it is you're suggesting.

9 **MR. KEESE:** Yeah. So I -- the reason why we didn't  
10 suggest plain-and-ordinary meaning was to include this  
11 clarification on the first point, which is that a tuning  
12 circuit can include multiple elements. If we look at the  
13 disclosure --

14 (Demonstrative published.)

15 **STPHAO:** -- of the tuning circuit at column 9, 45 to  
16 55, what we see is that there's at least three different  
17 potential modules or parts of a circuit that are identified.  
18 And it -- and it allows for other parts. So we think that  
19 that clarification that there can be multiple elements is  
20 helpful.

21 On the other issue --

22 (Demonstrative published.)

23 **MR. KEESE:** -- the idea of -- where they argue that  
24 "tuning circuit" is a circuit that tunes specifically this  
25 impedance matching between the RFID IC and a tag antenna, we

1 think that's wrong for several reasons.

2 The first is it's totally unnecessary. If you look at the  
3 claim language, the claim language says what the tuning  
4 circuit is tuning. It says it's configured to tune the  
5 variable impedance.

6 You don't need to add additional language about what the  
7 circuit does. It's right there in the claim language already.

8 **THE COURT:** So respond -- respond there. So I -- I'm  
9 looking at the claim -- claim language. Every time, you know,  
10 we get to "tuning circuit," it's followed by language saying  
11 what it's doing.

12 Mr. Lanier, so why do I need -- why do I need more than  
13 that?

14 **MR. LANIER:** Your Honor needs only the tag antenna  
15 for a reason I'm prepared to explain. But you don't need it  
16 otherwise than that.

17 We also don't need "circuit elements" because there's no  
18 mystery or confusion there. But I do think, frankly, the  
19 parties have already agreed with you that you need "tag  
20 antenna."

21 **THE COURT:** I didn't -- you think I need "tag  
22 antenna"?

23 **MR. KEESE:** I -- I disagree with that.

24 **THE COURT:** I thought so.

25 **MR. LANIER:** Well, except that the parties' joint

1 tutorial that was submitted to Your Honor to tell you what the  
2 technology is here, what we're talking about, describing  
3 what's happening, at Slide 17 talks about RFID tags and what  
4 happens if you have to harvest impedance.

5 And then it -- then turns immediately to the '266 patent  
6 as directed to tuning the impedance of the IC to match the  
7 antenna's impedance. And the antenna that's referred to is  
8 the antenna of the RFID tag in the immediately proceeding  
9 bullet. That's tutorial Slide 17. That's the parties' joint  
10 submission, not only talking about the background of the  
11 technology, but the '266 patent itself. It's directed to that  
12 tuning.

13 **MR. KEESE:** Your Honor, if I may respond briefly on  
14 that point.

15 **THE COURT:** You may.

16 **MR. KEESE:** So I agree that generally a tag will have  
17 an antenna that's external to the IC. But the '266 patent is  
18 clear that that is not the only disclosure. The '266 patent  
19 makes clear that the antenna segment may be part of the IC  
20 itself.

21 And in that case, what I'm worried about is that they will  
22 argue that "tag antenna" requires these external antennas.  
23 Now, I don't think that's an issue necessarily in this case.  
24 But I do think it would be an issue to limit the claim  
25 language in that way because that is not what the '266 patent

1 teaches. It's not that narrow.

2 **THE COURT:** Any response?

3 **MR. LANIER:** Your Honor, I would simply refer Your  
4 Honor to the pieces of the specification in Dr. Smith's  
5 declaration at our slides 30 and 31. The disclosure is  
6 clearly -- consistently, there's the RFID IC. And there is a  
7 tag antenna. Doesn't always say the word "tag antenna," but  
8 the specification at lines 9, 28 to 32, 10, 57 to 63, and on  
9 and on.

10 And, again, the parties have described not only the  
11 background of the technology but talked about what the '266  
12 patent -- or to what it is directed. And we do think that  
13 "tag antenna" is an appropriate and necessary clarification.

14 Because, otherwise -- well, I'm not going to speculate.  
15 We do think that's appropriate. That's what should be there.  
16 It will give the jury some guidance.

17 **MR. KEESE:** Your Honor, I just have two sentences in  
18 response there. And that's first, that obviously we've cited  
19 to column 5, lines 4 to 6, where it discloses an internal  
20 rather than an external antenna on the tag.

21 And what I'll note is the term "tag antenna" just doesn't  
22 appear in the patent whatsoever so we just don't think it  
23 belongs here.

24 **THE COURT:** Okay.

25 Next?

1           **MR. KEESE:** And this is last term, Your Honor. It's  
2       "variable impedance." And I'm happy to go first or to have  
3       NXP go first depending upon your preference.

4           **THE COURT:** Well, NXP is arguing that there doesn't  
5       need to be a construction, so why don't you go first.

6           **MR. KEESE:** Yes, Your Honor.

7                       (Demonstrative published.)

8           **MR. KEESE:** I'm not sure that the parties are hugely  
9       far apart about what a "variable impedance" here is.

10          We do think that our construction clarifies a couple of  
11       points. The first is it makes absolutely clear that the  
12       variable impedance isn't limited to a single element so that  
13       would be a continuously variable impedance element.

14          Think of that like a knob on a grill where you can tune  
15       the grill's gas to any point from zero to a hundred and where  
16       that analog tuning allows you to hit basically any point,  
17       any -- any point on that continuum.

18          The '266 patent is clear that that is one embodiment of a  
19       variable impedance. But there's also embodiments that involve  
20       multiple fixed-value impedances. So, for instance, multiple  
21       fixed capacitance values that can be then switched in and out  
22       of the circuit to allow you to get different values.

23          So think of that like adding additional segments of -- of  
24       rope or taking them out of a loop. And -- and so then you  
25       have specific different values that can be reached, but you

1 still have a variable impedance there.

2 So we think the idea of having multiple circuit elements  
3 clarifies that issue. I'm not sure that there's a dispute  
4 from them that -- that a switchable bank of capacitors is a  
5 variable impedance, but we think that the construction  
6 clarifies that.

7 **THE COURT:** So, Mr. Lanier, is -- the briefing  
8 suggested that the dispute here is whether variable impedance  
9 means the provision of multiple values versus a single  
10 variable value.

11 Do I understand the argument, or is there something else?

12 **MR. LANIER:** We think that the common -- you don't  
13 misunderstand our argument, Your Honor.

14 But I think the emphasis may have been misplaced. That's  
15 really designed not to have Your Honor decide and tell the  
16 jury what a "variable impedance" is but to explain that no  
17 construction is necessary, right?

18 There is no -- no evidence in the record, no expert  
19 testimony, no nothing, that suggests that a person of skill  
20 would not understand "variable impedance."

21 The only evidence, as we cited in our briefs, on our  
22 Slide 33 as well, is that a person of skill would understand  
23 "variable impedance."

24 **THE COURT:** Well, the question is would the jury.  
25 You don't have to have someone skilled in the -- in the art

1 to -- that -- you don't have to have a debate there for the  
2 court to construe a term that the jury wouldn't otherwise  
3 understand.

4 **MR. LANIER:** So at some level, that's true. At some  
5 level, we always have to do some explaining to juries in these  
6 cases, consistent with the court's constructions. But I do  
7 think an elemental or group --

8 **THE COURT:** But, Mr. Lanier, if you're going to  
9 explain something to the jury that is inconsistent, that you  
10 both don't agree on, whether or not the experts dispute it is  
11 irrelevant. It's still a problem because the court is the one  
12 that sets the metes and bounds of the patent.

13 So do you agree -- if -- if he stands up to the jury and  
14 with respect to this claim says, well, ladies and gentlemen,  
15 "variable impedance" means an element or group of elements  
16 that's capable of providing multiple impedance values, are you  
17 going to object?

18 **MR. LANIER:** Well, we'd object to that now because  
19 that doesn't actually tell the jury anything.

20 If the court is inclined to resolve any potential  
21 confusions for the jury, the definition ought to be "a circuit  
22 that varies the impedance" because "an element or group of  
23 elements that is capable of providing multiple impedance  
24 values," that goes far beyond any clarification that's  
25 necessary and -- and truly, the dispute that will be in front

1 of Your Honor, either on motions or in front of the jury,  
2 depending on those motions, isn't really what the "variable  
3 impedance" is but whether the variable impedance to which they  
4 are pointing does the impedance matching that's claimed.

5 That's a different dispute. But there's not going to be a  
6 dispute about what the variable impedance is, so we don't  
7 think any construction's required. If the court's inclined to  
8 construe to avoid uncertainty, we don't "an element or group  
9 of elements" helps at all. A circuit's a circuit that is --  
10 that varies the impendent [phonetic] -- and, again, that  
11 doesn't mean we have to -- they have to prove that here's a  
12 circuit and here, watch it varying the impedance, it's just  
13 that the device must be configured with that.

14 **THE COURT:** What's wrong with that construction.

15 **MR. KEESE:** Well, Your Honor, I think what's --  
16 what's wrong with that construction is that the variable  
17 impedance is the thing that's is being varied. So the patent  
18 discusses the tuning circuit varying the impedance of the  
19 variable impedance.

20 And so the variable impedance itself is --

21 **THE COURT:** So here's -- here's the thing: Is it  
22 right that we aren't going to have experts come in and dispute  
23 what -- what "variable impedance" means?

24 **MR. KEESE:** According to what I'm hearing from  
25 Mr. Lanier, that -- that may be the case. They may not

1 dispute the idea that a bank of switchable capacitors is a  
2 variable impedance.

3 I still think that the term "variable impedance" could be  
4 slightly confusing for a jury --

5 **THE COURT:** Right, but I don't know that your  
6 construction explains it. So -- and you did this on the other  
7 one in terms of wanting "circuit" to be defined as "circuit  
8 elements."

9 I mean, I -- an -- if you're using it that way, then your  
10 element or group of elements, isn't that a circuit?

11 **MR. KEESE:** Not --

12 **THE COURT:** If it's not, there -- we have problems  
13 here because now, you're being inconsistent between your  
14 terms.

15 **MR. KEESE:** I -- I don't know that that is  
16 necessarily -- I think you can have multiple elements that are  
17 part of a circuit.

18 I think you could have multiple elements that aren't  
19 necessarily within the conventional understanding of what a  
20 circuit is, if that makes sense. I apologize if that's --

21 **THE COURT:** Well, the problem is that if it's not  
22 clear to me, it's not going to be clear to a jury, because you  
23 all strike all of the technical people from my juries. So you  
24 aren't going to have technical people on that jury.

25 **MR. LANIER:** Your Honor, if -- if I may offer this:

1 You know, the time for the experts to say there's a  
2 misunderstanding or dispute or confusion about what "variable  
3 impedance" means is now.

4 That's the purpose of this exercise we're going through.  
5 One expert offered an opinion on that topic. That opinion was  
6 the term "variable impedance is a known, widely used and  
7 well-understood term." That was Dr. Van der Weide.

8 Dr. Smith did not dispute that. He just said lots of  
9 things can vary an impedance. But that's a different issue.  
10 That's not what a "variable impedance" is. That's what might  
11 we accuse of varying the impedance consistent with the claims.  
12 That's a different issue. The only dispute in front of Your  
13 Honor, it -- I'm -- and I want to address the jury confusion  
14 issue, but the only dispute in front of Your Honor right now  
15 is, is a construction of "variable impedance" required, and  
16 that -- their evidence is undisputed. That is a term well  
17 understood by one of skill in the art.

18 We think that should end it, but to address Your Honor's  
19 concern, a variable impedance, even though it is something  
20 that's understood, an elements an/or group of elements that is  
21 capable of providing multiple impedance values, I -- I  
22 actually don't see that that adds to the word "variable." I  
23 think a jury will understand that. We are not going to strike  
24 people that don't understand the word "variable."

25 **THE COURT:** Well, that's why I asked originally

1 whether the -- the institute here was multiple vs. single.  
2 And if that's not really the dispute, then I'll have to go  
3 back to the drawing board. And it doesn't sound like that's  
4 the dispute.

5 **MR. KEESE:** I -- I think that isn't the dispute.  
6 And -- and, honestly, if that is not the dispute, I think as  
7 long as there is that clarification in the order, we could go  
8 with plain-and-ordinary meaning, as long as there's the  
9 clarification that it could include a structure with multiple  
10 switched elements.

11 **MR. LANIER:** Well, that's a -- that's a different  
12 point, Your Honor. Right?

13 That's -- that's -- see, that's exactly the summary  
14 judgment argument they want to make down the road potentially  
15 or response to a summary judgment argument.

16 So the clarification might be the parties are not taking  
17 the position that the -- that there is a dispute as to whether  
18 either multiple values or a range of values or adjustable  
19 values are a variable impedance. That's not the dispute we're  
20 presenting to Your Honor this morning.

21 But there's a -- it's a different issue as to whether a  
22 variable impedance can be a bank of switched capacitors.  
23 That's something they're asking you to opine on with no need  
24 and without adequate evidence in the record about that.

25 And, frankly, because we still don't yet know for sure

1 what they're going to accuse as the processor block that  
2 includes all these things, we have to see what they're  
3 pointing to within that processor block.

4 **THE COURT:** Okay. Anything else you want me to  
5 consider?

6 **MR. KEESE:** No, Your Honor. I think that's all of  
7 the -- the claim terms.

8 **MR. LANIER:** Not from us, Your Honor. Thank you very  
9 much for the time.

10 **THE COURT:** So you all were very quick. Great.  
11 Gives me time. Every minute counts.

12 You all charge by the six minutes. I'm just trying to --  
13 I charge by the number of orders I can get out the door, so --  
14 so minutes are precious.

15 One of the things that -- since I have you here, we've  
16 gone through all the terms, right?

17 **MR. LANIER:** Yes, Your Honor.

18 **THE COURT:** I'm going to give you a schedule. Let's  
19 get that out. One of the things that I do try to do -- I try  
20 to get these orders out pretty quickly while -- while the  
21 arguments are still fresh in my mind. So I expect, you know,  
22 I should have this order out in the next week or so.

23 Given that, I pulled your -- your case schedule. And  
24 we're just going to go through it so that we can get the -- we  
25 can keep this thing moving. And I'm going to -- I'll give you

1 dates. And I'm operating off of an --

2 And, Mr. Garcia, maybe you can just bring it up on the  
3 screen, Docket 97. Can you bring that up on the screen?

4 **THE CLERK:** Sure.

5 **THE COURT:** So Docket 97 is your case schedule. And  
6 page 2 of 5 when you get there. I don't know who has the  
7 operative document. But if you can send it to us, we can --  
8 we can put these dates in.

9 I'll give you an --

10 (Document displayed.)

11 **THE COURT:** I really do hope to have this out by next  
12 week, but I will give you -- an extra week doesn't hurt. So  
13 we'll assume that the claim -- you'll receive the claim  
14 construction ruling no later than the 18th, and you will  
15 likely get it well before then.

16 But that means that the case-narrowing event, the bottom  
17 of that sheet, Mr. Garcia, the deadline, then, will be  
18 April 8th, 21 days after.

19 Then the next one, Patent Local Rule 3.7, 30 days after  
20 the ruling, that will be April 18th.

21 The next date, fact discovery cutoff, April 25th.

22 Next deadline to participate in mediation, May 9th.

23 That is -- that's right around the corner. So what I am  
24 going to do is add on here -- well, do you know who you're  
25 going to mediate in front of?

1           **MR. AL-SALAM:** We've already scheduled it, Your  
2 Honor.

3           **THE COURT:** And when is it scheduled for?

4           **MR. AL-SALAM:** This -- next week.

5           **THE COURT:** Oh, great. Okay.

6           And do you have a -- do you have enough from me to do  
7 that? When --

8           **MR. LANIER:** Yes.

9           **MR. AL-SALAM:** Yes.

10          **THE COURT:** -- in terms --

11          **MR. AL-SALAM:** Because the dispute is large, so --  
12 but yes, we have enough from you, Your Honor.

13          **THE COURT:** Okay.

14          And when you say "the dispute is large," are there other  
15 cases pending other than these ones?

16          **MR. LANIER:** Yes.

17          **MR. AL-SALAM:** Two -- two others. Well, three if you  
18 include China. There's one in Seattle, and there's one in  
19 Waco, Texas.

20          **THE COURT:** Okay.

21          **MR. LANIER:** And there are some ancillary IPR's and  
22 proceedings following that as well.

23          **THE COURT:** Okay.

24          **MR. LANIER:** But we are meeting next week and talking  
25 about all of that.

1           **THE COURT:** Terrific.

2           **MR. LANIER:** Including specifically this case.

3           **THE COURT:** Okay.

4           So opening disclosures, then, June 8th.

5           Rebuttal experts would be August 15th.

6           Expert discovery cutoff, September 12th.

7           Deadline to file dispositive motions, motions to strike,

8           and *Dauberts*, October 10th. Now, that's a federal holiday.

9           Is it a holiday for you all? It's Veteran's Day.

10          **MR. LANIER:** What federal holiday is it?

11                               (Off-the-record discussion.)

12          **MR. AL-SALAM:** It doesn't bother us if that's the

13           deadline, either way --

14          **THE COURT:** Okay. 'Cause it's -- ECF is open.

15          **MR. LANIER:** Okay.

16          **THE COURT:** I was explaining to some law clerk how we  
17           used to rush to the courthouse with bikers and try to get  
18           those things on file before the courthouse doors closed. Now  
19           you get to stay up till midnight.

20           Okay. Deadline to file responses, then, as November 7th.

21           The deadline to file replies -- and this is a little harsh  
22           because under the protocol, it would be the Monday after  
23           Thanksgiving. So unless you -- unless you object, I would  
24           give that a few extra days.

25          **MR. AL-SALAM:** That's fine, Your Honor.

1           **MR. LANIER:** No objection.

2           **THE COURT:** Okay. December 2nd.

3           **MR. AL-SALAM:** Your Honor, I don't want to interrupt  
4 you, but just for clarity, that's -- that's a deadline to file  
5 a summary judgment motion.

6           Could you file one earlier, or do you prefer they not be  
7 filed until --

8           **THE COURT:** Oh, no. You can file earlier.

9           **MR. AL-SALAM:** Yeah.

10          **THE COURT:** All I would say is that -- I would say a  
11 couple of things. One is just remember you still have to  
12 comply with my standing order on summary judgments. It's --  
13 and I remind people because it's not routinely used in this  
14 district, but I find it to be very helpful. It also allows us  
15 to make sure that the schedule works for everybody in terms of  
16 responses.

17          If you're going to file motions to strike and/or *Dauberts*,  
18 they have to be filed at the same time. If you're going to do  
19 it later --

20          **MR. AL-SALAM:** I see.

21          **THE COURT:** -- then the problem is if I see them  
22 coming in, I'm just going to collapse them.

23          **MR. AL-SALAM:** I see. Okay. I understand.

24          **THE COURT:** You have to get -- you know, it takes a  
25 lot of time for us -- maybe not Judge Albright. He seems to

1 be able to generate lot of orders very quickly, but for us, it  
2 takes a lot of time.

3 And if I'm going into your space, then I want to do it all  
4 at once. It's more efficient.

5 **MR. AL-SALAM:** Understood, Your Honor.

6 **MR. LANIER:** Understood.

7 **THE COURT:** And I think that's -- that's the reason.  
8 It doesn't -- look, I would also say you only get one so --  
9 but if you think, like, this whole thing is being held up on  
10 one issue, then come and talk to me. Okay?

11 December 12th is when everything is ripe. It's going to  
12 take us a while to -- to look at it, plus then there are the  
13 holidays, so I'm setting your summary judgment hearing for  
14 January 11th, 2023, which is about a month later.

15 Are your trial calendars all booked up, or do you want a  
16 trial date now?

17 **MR. AL-SALAM:** Happy to have the trial date now.

18 **MR. LANIER:** I'm happy to have a trial date.

19 I do want to let the court know that, unless the court  
20 objects, I want to talk with Mr. Al-Salam over the next day or  
21 so about the fact discovery cutoff in view of the court's -- I  
22 hear that the court issued an order on the motion to amend.

23 And then Mr. Al-Salam mentioned this morning they may seek  
24 an additional amendment to accuse some additional products.  
25 And I haven't had a chance to talk with the team about whether

1 we think that changes the scope of discovery. I'm not saying  
2 it will, but I simply have not been able to think about it. I  
3 apologize.

4 So we may want to talk with Mr. Al-Salam about the fact  
5 discovery cutoff. I'm not suggesting changing the other dates  
6 except that any of them that don't affect the court might slip  
7 a little or something, but I would like to talk with him about  
8 that and if we're agreeable, perhaps come back to Your Honor,  
9 if that's okay.

10 **THE COURT:** That's fine. Would -- in this case,  
11 given the various issues, if -- you know, my preference is  
12 that you agree on something. If you agree on it, then it's  
13 generally not a problem.

14 And given -- given my calendar, I can't give you a date --  
15 a trial date until June anyway, so --

16 **MR. LANIER:** Okay.

17 **THE COURT:** Your trial date, then, is June 5th, 2023.  
18 Your pretrial conference is May 5th, 2023. That means that  
19 all your disclosures are due on April 21st. I do these patent  
20 cases a little early 'cause sometimes it takes more than one  
21 conference.

22 You'll be placed on a compliance calendar for April 20 --  
23 I mean, April 14th. I don't expect to see you on April 14th.  
24 What I expect is that five business days prior, by April 7th,  
25 you'll file a joint statement saying that you've read my

1 standing orders on trials; everybody is complying; and there  
2 are no issues.

3 If there are issues, that's when I want to know, in April.  
4 Not after the fact, okay?

5 **MR. AL-SALAM:** Thank you, Your Honor.

6 And to be clear, you want us to send you the Word document  
7 on which this --

8 **THE COURT:** Yeah.

9 **MR. AL-SALAM:** -- current schedule is.

10 **THE COURT:** Correct, 'cause then we can just pop it  
11 into an order without having to retype anything.

12 **MR. AL-SALAM:** That's fine. We will do that.

13 **THE COURT:** Okay. Anything else we can do today?

14 **MR. LANIER:** Other than expressing my sheer delight  
15 to be back in a courtroom, nothing else from us, Your Honor.

16 **THE COURT:** You know, it's very funny --

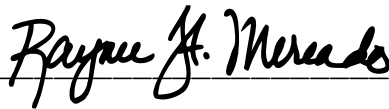
17 Well, we're adjourned.

18 (Proceedings were concluded at 10:41 A.M.)

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**CERTIFICATE OF REPORTER**

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this hearing was taken, and further that I am not financially nor otherwise interested in the outcome of the action.



Raynee H. Mercado, CSR, RMR, CRR, FCRR, CCRR

Tuesday, March 15, 2022